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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 198.

RAMON VALDES,

Appellant,

v.

CENTRAL ALTAGRACIA, INCORPORATED, AND NEVERS & CALLAGHAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR APPELLANT.

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THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

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No. 193.

RAMON VALDES, Appellant, v. CENTRAL ALTAGRACIA, INCORPORATED, and NEVERS & CALLAGHAN.	**Appeal from the District Court of the United States for Porto Rico.**

BRIEF FOR APPELLANT.

Statement of Facts.

On January 18th, 1905, Salvador Castello and Joaquin Sanchez de Larragoiti entered into a contract in writing, whereby Sanchez de Larragoiti, who was the owner of the old Central Altagracia, and twenty-two cuerdas of land, leased these properties to Salvador Castello for a term of ten years (Record, pp. 44-46). Said Central and lands were to be used by the lessee for the manufacture of sugar.

On June 6th, 1905, a supplemental agreement was entered into between the same parties, whereby the duration of the lease was extended from ten to twenty years (Record, p. 46).

On July 1st, 1905, Salvador Castello, by a public instrument, transferred and assigned to Central Altagracia, Incorporated, a Maine corporation, all his rights under the contract between him and Sanchez de Larragoiti (Record, pp. 46–50).

On April 11th, 1907, the Central Altagracia, Incorporated, being indebted to Ramon Valdes in the sum of $35,000, made a conditional sale (venta con pacto de retro), maturing April 1, 1908, of the machinery of the said Central to said Ramon Valdes (Record, pp. 50–53). This conditional sale was authorized by the Board of Directors of the Central, but was neither authorized nor ratified by the stockholders of the corporation.

On October 28th, 1907, that is, before the consummation of the conditional sale, a public instrument was executed between the Central Altagracia, Inc., and Ramon Valdes, whereby the said corporation, represented by its president, F. L. Cornwell, who was duly authorized for such purpose by resolutions of the stockholders and directors of the company, sold, assigned and transferred, absolutely, to Ramon Valdes,

(*a*) the contract of lease and all other rights which the company acquired from Salvador Castello, which said rights were such as were acquired by the latter from Don Joaquin Sanchez de Larragoiti, and

(*b*) "each and every right appertaining to the company in and to the machinery, utensils and appurtenances that existed on the properties of the Central Altagracia at the time that the contract of lease was assigned to the Company, as well as such rights as the Company has in and to the machinery, utensils and appurtenances installed by it thereafter on the said properties" (Record, pp. 42–54, at 53).

The consideration for said absolute sale was the sum of $65,000, confessed to have been received by the company from Valdes. Of this amount, $35,000 represented the amount owing by the company to

Valdes under the above-mentioned conditional sale agreement of April 11, 1907, and $30,000 had been received afterwards by the company in cash (Record, p. 53).

After becoming the sole and absolute owner of the rights of the Central to the contract of lease and the machinery by virtue of the said deed of October 28th, 1907, Ramon Valdes, on November 2nd, 1907, made a new contract with Central Altagracia, Incorporated, whereby, he *conditionally sold* to the said company the same rights acquired by him by the deed of October 28th, 1907 (Record, pp. 55–59). The price of this sale was the sum of $65,000, which sum the company agreed to pay to Valdes in four installments, payable on the first day of April of the years 1908, 1909, 1910 and 1911 respectively (Record, p. 56).

It was expressly stipulated in and by this contract of November 2, 1907, that upon a failure to pay any one of the four installments of the purchase price, the total sum would at once become due and payable and that the vendor Valdes was thereupon to have the right to enter and take possession of the properties conditionally sold by him to the company (Record, p. 57).

It was further stipulated in and by this contract that the title and right of ownership over the said lease, machinery and other properties was to remain in Valdes and would not pass from him to the vendee, Central Altagracia, Inc., until the total purchase price was paid; and that in case of default Valdes should have the right to take possession as the owner thereof (Record, p. 57).

The first installment of the purchase price under the said contract became due on the first day of April, 1908; and the Central Altagracia made default in the payment of the said installment and also failed to pay the interest due on the total purchase price (Record, pp. 3, 39).

On May 27th, 1908, the defendants, Nevers and Callaghan, who had obtained a judgment for $15,-

878.87 in the United States District Court for Porto Rico, against the Central Altagracia, levied upon all the machinery in the factory building of the said Central Altagracia for the satisfaction of the said judgment (Record, p. 79).

The judgment in favor of Nevers & Callaghan under which this levy was made was entered on May 16, 1908, and represented the balance of a total indebtness of $25,000 on an unsecured loan made in October 1906 (Record, p. 79).

Neither the contracts between Valdes and Central Altagracia, Incorporated, nor the debt or levy of Nevers & Callaghan were recorded in the Registry of Property.

On June 2nd, 1908, Valdes filed his suit at law in the Court below claiming the possession of the properties by him conditionally sold to the Central Altagracia, Inc., and claiming $10,000 as damages for the detention of the premises. On the same date, and as supplemental to his suit at law, Valdes filed his bill of complaint on the Equity side of the Court, containing substantially the same allegations as, in the suit at law and praying for the appointment of a receiver (Record, pp. 1-5).

On the same day the Central Altagracia, Inc., filed its bill in equity praying also for the appointment of a receiver (Record, pp. 7-12).

The Court thereupon appointed a temporary receiver and custodian and later, after consolidating the two causes by an order dated July 20, 1908, appointed a permanent receiver of the above-mentioned leasehold and other properties. This permanent receiver entered into possession and continued in the management of said properties until the sale thereof under the decree of October 14, 1909.

The receivership resulted in a loss of about $17,000, represented in part by outstanding receiver's certificates (Record, pp. 89, 100-101).

On July 21, 1909, the demurrers which had been interposed in each of the two causes were overruled, and the defendants in each case were required to

answer on or before July 26, 1909, so that the trial of the issues thus raised might begin the following day. This order contained the proviso that "nothing in this order shall prevent the parties in either case, as may be proper, from immediately amending their bills or from filing a cross bill in addition to an answer, but in such case, the latter shall be considered as denied, and issue made as may be proper so that the trial may proceed notwithstanding" (Record, pp. 24-25).

Accordingly, the following proceedings thereupon took place in the two causes respectively:

(*a*) Cause in which Central Altagracia, Incorporated, was plaintiff:

In this cause, plaintiff, pursuant to the permission contained in the above order of July 21, 1909, filed an amended bill of complaint on July 22, 1909 (Record, pp. 29-36), to which the defendant Valdes on July 27, 1909, filed an answer and cross-bill (Record, pp. 65-73, 73-77), the complainant thereupon refusing to file any further pleadings within the time allowed by the Court.

(*b*) Cause in which Valdes was complainant:

In this cause Central Altagracia, Incorporated, on July 24, 1909, filed its answer (Record, pp. 37-59), to which Valdes filed his replication on July 28, 1909 (Record, pp. 85-86).

Nevers & Callaghan were made parties defendant, and on July 27, 1909, filed their answer and cross-bill to the bill of complaint and cross-bill of Valdes filed in the two causes respectively (Record, pp. 78-82), whereupon Valdes filed his replication to the answer of Nevers & Callaghan (Record, p. 83), and his answer to the cross-bill of Nevers & Callaghan (Record, pp. 84-85).

The Court below in its decision (Record, pp. 86-95) declined to give effect to the agreements between Valdes and Central Altagracia, Incorporated, of Oc-

tober 28, 1907, and November 2, 1907, according to their terms, but held that these resulted in an equitable mortgage or lien in favor of Valdes for $65,000 and interest inferior to the lien obtained by Nevers & Callaghan by the levy of their execution on May 27th, 1908, prior to the application for the receivership in the present cause. Accordingly, the decree of the Court below was for the foreclosure of the equitable mortgage or lien found by the Court to exist in favor of Valdes, with the provision that the proceeds of sale should be applied to or toward the payment of the claims in the following order:

1. Outstanding debts of receivership.
2. Nevers & Callaghan's claim.
3. Valdes' lien for $65,000 and interest.
4. All other creditors. (Record, p. 102.)

Upon the sale made pursuant to the final decree below Valdes became the purchaser, and was placed in possession of the leasehold and other properties theretofore covered by the receivership.

Since, as is contended on his behalf on this appeal, Valdes was, under the agreements of October 28, 1907, and November 2, 1907, the absolute owner of the properties involved and as such entitled to the absolute possession thereof, he is, although now in possession under the decree of October 14, 1909, nevertheless prejudiced by said decree in so far as it obliged him to pay as a condition of obtaining such possession the Nevers & Callaghan judgment against Central Altagracia, Incorporated. Valdes has, therefore, taken this appeal from the last mentioned decree to the extent to which it so prejudices him.

This appeal therefore is more particularly from such portions of the decree as declared the claim of Nevers & Callaghan to be a lien superior to that of the Valdes claim and which required that Valdes, as the purchaser at the sale should, in addition to the costs and receivership debts, pay into the registry of

the Court the full amount of the Nevers & Callaghan claim.

The following assignments of error (Record, pp. 105–107) indicate in what the decree below is claimed to be erroneous and the grounds of the present appeal:

I. "That the District Court of the United States for the District of Porto Rico erred in not finding that Ramon Valdes was and is the absolute owner of the property of the Central Altagracia, Incorporated, by virtue of the contracts executed on the 28th of October and 2nd of November, 1907, respectively, by and between the Central Altagracia, Incorporated, and the said Ramon Valdes.

II. "That the said Court having found the transactions between Ramon Valdes and the Central Altagracia, Inc., did not amount to fraud in law upon the creditors of the said orporation, committed error in not holding that the said Ramon Valdes had a right and was entiled to the immediate possession of the property of the said Central by virtue and under the express terms of the said contracts of October 28 and November 2, 1907.

III. "That the said Court erred in finding that the transaction between the Central Altagracia, Incorporated, and Ramon Valdes, notwithstanding the express stipulation of the instruments executed between the parties, was a loan of money for which security was intended to be given, and that the legal effect of the aforesaid contracts of October 28th and November 2nd, 1907, between the Central Altagracia, Incorporated, and Ramon Valdes, was to create an equitable mortgage or lien over the property of the Central Altagracia, Incorporated, and in favor of the said Ramon Valdes for the sum of Sixty-five thousand dollars ($65,000), together with the interest stipulated in the said contracts, and that as to the other amounts claimed by the said Ramon Valdes, he is but a general creditor of the corporation.

IV. "That the said Court erred in finding that Nevers & Callaghan acquired a lien and

prior rights over the property of the Central Altagracia, Incorporated, by virtue of the execution levied upon the property on the 29th of May, 1908, and in holding the said lien to be superior to the equitable mortgage or lien found to exist over the said property and in favor of the said Ramon Valdes.

V. "That the said Court erred in holding that the said contracts of October 28 and November 2, 1907, could not bind or prejudice Nevers & Callaghan because they were not recorded; and it also erred in holding that the said Nevers & Callaghan were third parties within the meaning of the law providing for the registration of deeds of real property.

VI. "That the said Court erred in ordering the sale of the property of the Central Altagracia, Incorporated, which is the same claimed by Ramon Valdes to be his absolute property by virtue of the aforesaid contracts.

VIII. "That the said Court erred in decreeing that out of the proceeds of the said sale the claim of Nevers & Callaghan must be paid in full and before payment of the equitable mortgage or lien found to exist over the property of the Central Altagracia, Incorporated, and in favor of Ramon Valdes.

X. "That the said Court erred in holding that the said Ramon Valdes, in case he should become the purchaser at the sale must, in addition to the costs and receivership debts, pay in full into the Registry of the Court the claim of Nevers & Callaghan."

The record consists of the pleadings and the decision and decree below; it does not contain any evidence on any questions of fact and the appeal raises only questions of law as to the legal effect of instruments the execution of which is admitted.

ARGUMENT.

POINT I.

Valdes through the transfer to him by Central Altagracia, Incorporated, of October 28, 1907, became the owner of the leasehold and all machinery and appurtenances, and under the conditional sale agreement of November 2, 1907, between him and Central Altagracia, Incorporated, the ownership of these properties continued in Valdes pending the payment by the vendee of the stipulated purchase price.

Pursuant to the votes of its stockholders as well as its directors (Record, p. 43) Central Altagracia, Incorporated, by the public instrument of October 28, 1907 (Record, pp. 42–54), sold assigned and transferred to Valdes its leasehold under the Sanchez leases, and all its rights to the machinery and appurtenances (Record, p. 53) for the sum of $65,000, which the company then owed Valdes (Record, pp. 43, 53).

Valdes, thereupon, on November 2, 1907, made a conditional sale of the same properties to Central Altagracia, Incorporated (Record, pp. 55-59), under a contract providing for the payment of the purchase price of $65,000 in installments, and further providing "that the 'dominio' and ownership of the contract of lease and of all other rights which are the object of this contract will belong exclusively to Valdes y Cobian, while the Company shall not have paid in full the price" of said properties (Record, p. 57).

The Court below declined to give effect to these

instruments of October 28 and November 2, 1907, according to their terms, and, refusing to recognize Valdes as the owner of the properties in question, treated the entire transaction as resulting in a chattel mortgage by the company in favor of Valdes for $65,000.

This, it is submitted, was error.

Under the law of Porto Rico there are two fundamental principles governing the interpretation of contracts (1) great freedom in the making of contracts, and (2) great strictness in their interpretation. Sections 1222, 1058 and 1248 of the Civil Code of Porto Rico provide as follows:

> "SECTION 1222.—The contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravenvention of law, morals or public order.
>
> SECTION 1058.—Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations.
>
> SECTION 1248.—If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed."

The sections quoted were taken bodily from the Civil Code of Spain, and hence the Spanish authorities relating to these sections are in point.

The recent work on the Spanish Civil Code by the distinguished comentator don José María Manresa y Navarro, referring to Article 1281 of the Spanish Code, which corresponds to Section 1248 of the Porto Rican Code above quoted, says at page 704 of Volume VIII:

> "En principio la ley coloca la intención de los contrayentes, que es el alma del contrato, sobre las palabras, que son el cuerpo en que aquella se encierra, y tan es así, que cuando se atiende al sentido literal, es porque, siendo los términos claros, se supone que en ellos

está la voluntad de los contratantes; en suma, valen las palabras, no por si, por lo que dicen. Pero la prevención contra el litigio, el temor de que lo hasta entonces claro quede oscurecido, y el de que lo cierto, las palabras inequívocas, se cambien por lo dudoso, hace que el sentido literal de los términos tenga una influencia extraordinaria, impidiendo, cuando aquéllos son claros, que se planteen problemas difíciles, en averiguación del propósito de los contratantes."

(Translation.)

"In principle, the law, in order to ascertain the intention of the contracting parties, which is the soul of the contract, looks to the words, which constitute the body in which that soul is enclosed. The literal sense of the words is adhered to, because, where such words are clear, they are assumed to express the will of the contracting parties. To sum up, the words are important, not in themselves but because of what they express. The extraordinary influence thus exerted by the literal sense of the words flows from the desire to avoid litigation, from the fear that what has been clear may become involved in doubt, and that what has been certain in the shape of unequivocal expressions may be superseded by what is doubtful. When expressions are clear, it is thus possible to avoid those difficult questions which involve an investigation into the intentions of the contracting parties."

Applying these principles the Court below should have held that by virtue of the instruments executed by the corporation to Valdes, and by Valdes to the corporation, Valdes became and continued to be the owner of the properties under consideration, pending the payment of the price mentioned in the conditional sale agreement.

Under well settled precedents, this contract of conditional sale was binding not only on the parties thereto, but was effective also as to prior and subsequent creditors of the vendee.

The condition that the sale shall be ineffectual if

the price is not paid within the time specified in the contract is well known and very frequent in the old Spanish legislation. Such stipulation was called "Pacto de la Ley Comisoria."

See Ley XXXVIII, Title V, Quinta Partida.

The decision of the Supreme Court of Spain in the case of *Luisa Blanchart* v. *Ladislao Redondo and Jose Pillado* is directly in point. This case was decided February 16, 1894, and is reported in "Jurisprudencia Civil, Tribunal Supremo de Justicia," Vol. LXXV, p. 215 (See also Anuario de 1894, apendice al "Diccionario de Administracion," de Alcubilla, pp. 202 and 203, Madrid, 1894).

This case arose under Article 1255 of the Spanish Code, which is identical with Section 1222, above quoted, of the Porto Rican Code, and directly sustained the validity of a conditional sale, holding that title to the thing thus sold remained in the vendor, after delivery of possession to the vendee, even as against third parties. The facts briefly were as follows:

Luisa Blanchart sold to Ladislao Redondo several properties, which she delivered to the vendee under an inventory; but the vendor reserved to herself the title to the properties sold, until the payment by the vendee of the purchase price. Jose Pillado, a creditor of Redondo the vendee, attached the properties in a suit against Redondo; and then Mrs. Blanchart intervened in the suit claiming that she was the owner of the properties attached by Pillado.

The Court admitted the intervention, and an appeal having been taken to the Supreme Court of Spain, the latter Court held that Mrs. Blanchart was entitled to the possession and ownership of the properties.

The Supreme Court of Spain, speaking of the stipulation whereby the vendor reserved the title to the properties, said at page 220:

> "Considerando que semejante contrato es perfectamente lícito y obligatorio entre los que lo celebraron, y en nada se opone á los preceptos legales que se suponen infringidos en los motivos cuarto, quinto y sexto, toda vez que, según precepto terminante del art. 1255 del Código civil, los contratantes pueden establecer los pactos, cláusulas y condiciones que tengan por conveniente, y no cabe afirmar que la venta de los muebles concertada entre doña Luisa Blanchard y don Ladislao Redondo y cesión que desde luego le hizo para su uso y disfrute, reservándose, no obstante, el dominio de ellos hasta que se pagara el precio, condición que se estableció como garantía en beneficio de la vendedora, se oponga de modo alguno á las leyes, á la moral ni al orden público.'

(Translation.)

> "Such stipulation is perfectly legal and binding between the contracting parties and is not contrary to the legal provisions thought to have been violated, inasmuch as according to the express language of Section 1255 of the Civil Code the contracting parties may agree to all the stipulations, clauses and conditions which they may deem convenient; and it cannot be alleged that the contract of sale with the delivery of the possession made between Luisa Blanchart and Ladislao Redondo, whereby the vendor reserved the title to the property until payment of the price (which condition was established as a security for the benefit of the vendor) is a contract contrary to law, or against morals or public policy."

Jurisprudence Civil, Tribunal Supremo De Justicia, Vol. LXXV, p. 220.

Interpreting the Porto Rican Code in the light of the above Spanish decision, the conditional sale from Valdes to Central Altagracia, Incorporated, was

clearly valid under the Porto Rican law and, pursuant to it, Valdes was entitled to the possession and ownership of the properties as against the levy under the Nevers-Callaghan judgment.

Similarly and commenting on the same Article 1255 of the Spanish Code, but referring to another decision, Manresa, in his well recognized "Commentaries on the Spanish Civil Code", says at page 607 of Volume VIII of said work:

> "La sentencia de 6 de Marzo de 1906, declara válido, como no contrario á las leyes, á la moral ni al orden público, el pacto de no trasmitirse la propiedad de la cosa vendida, al comprador, hasta abonar éste el último plazo de su precio, y en su consecuencia, si no se abona alguno de los últimos, se entiende que se trasmitió solo el uso ó disfrute, y puede reclamarse por el vendedor la propiedad."

(Translation.)

> "The decision of March 6, 1906, declared that a stipulation that title to the thing sold should not pass to the purchaser until the payment of the final installment of the purchase price, was valid on the ground that it was not contrary to statutes, morals or public order, and consequently if any such installments be not paid, it is understood that what was conveyed was only the use or enjoyment of the thing, and that the vendor may claim the title or ownership thereof."

Additional authority in favor of appellant's contention is found in Section 1081 of the Porto Rican Code and the Spanish decisions bearing on corresponding provisions of the Spanish Code.

Section 1081 of the Civil Code of Porto Rico provides as follows:

> "In conditional obligations, the acquisition of rights as well as the extinction or loss of those already acquired, shall depend upon the event constituting the condition."

This section is taken bodily from the Civil Code of Spain and corresponds to Article 1114 of the latter. The Supreme Court of Spain in the case of *Urrea against Perez and another* (Civil Cause No. 65, reported in "Jurisprudencia del Tribunal Supremo", Vol. LXXX, at p. 254), decided on October 7, 1896, held that an agreement to sell certain property at an agreed price to be paid part down and the balance at the end of a year, was not a sale whereby title passed to the vendee, but merely a promise to sell which terminated upon the expiration of the period fixed for the payment of said balance and that the title remained in the vendors unless the vendee paid the balance of the purchase price before the expiration of the period agreed upon. Said the Court at page 258:

> "Considerando que, según el sentido general de la escritura de 20 de Febrero de 1890, otorgada por don Andrés Pérez y don Andrés Márquez con doña Eugenia Urrea, y muy especialmente lo consignado en su cláusula 1.ª, el concepto jurídico del contrato en ella celebrado no es otro que el de promesa de cesión condicional de las tres quintas partes de la mina El Globo y sus demasías, puesto que para ponerse la cesionaria en situación de pedir el cumplimiento de la obligación, era condición expresa é ineludible la de haber entregado en el día fijo, que al efecto se señala, la cantidad de 11,000 pesetas al Pérez y 15,000 al Márquez, sin cuyo requisito quedaba nula y sin efecto legal la promesa de cesión y sin derecho la cesionaria á reclamación alguna, no teniendo aplicación al caso el art. 1450 del Código civil, como se supone en el primer motivo del recurso, y siendo rectamente aplicado por la Sala sentenciadora el 1114, según el cual, la adquisición de los derechos en las obligaciones condicionales depende del acontecimiento que constituya la condición."

(Translation.)

> "According to the general significance of the deed of February 20, 1890, by and between Andres Perez and Andres Marquez, of the one

> part, and Eugenia Urrea, of the other part, and especially the provisions of clause first thereof, the juridical concept of the contract therein made is solely that of a conditional promise to transfer three-fifths of 'El Globo' mine and annexes for the reason that in order to be in a position to demand the fulfillment of the obligation, the transferee must in accordance with the express and unavoidable condition agreed on have delivered upon the date agreed upon the sum of 11,000 pesetas to Perez and 15,000 to Marquez, and failing to comply with this requirement, the promise to transfer the property became null and void and without any legal effect, and the purchaser had no lawful claim therefor, as Article 1450 of the Civil Code cannot be applied to the present case, notwithstanding the allegation in the first of the grounds of the appeal, and the lower Court having correctly applied to the present case Article 1114 according to which the acquisition of rights in conditional obligations depends upon the event constituting such condition."

It is submitted, therefore, that under the Porto Rican law, Valdes clearly continued to be and at the time of the levy under the Nevers & Callaghan judgment, was the owner of the properties in question. It follows that the levy was not on property of the judgment debtor, Central Altagracia, Incorporated, and was therefore invalid. Valdes could not be required to pay the judgment in order to release *his* property from such invalid levy and the decree in so far as it required this is erroneous.

The effect of the decision of the Court below was practically this: it held that the transaction between Valdes and Central Altagracia, Incorporated, was not the perfectly valid transaction which upon the face of the instruments of October 28th, 1907, and November 2, 1907, it purported to be, but that notwithstanding the express terms of these instruments the transaction was an equitable mortgage from the company to Valdes. Having thus assumed

the transaction to be something different from what the parties by their acts made it, the Court thereupon held such assumed transaction to be a chattel mortgage unknown to the Porto Rican law and therefore giving Mr. Valdes no rights superior to the subsequent levy under the Nevers & Callahan judgment.

After Central Altagracia, Incorporated, and Valdes, presumably acting under legal advice based upon the authorities above mentioned, had entered into agreements which under these authorities made Valdes the owner of the property under consideration, with rights superior to those of any creditor of Central Altagracia, Incorporated, what reason or warrant could there be for the action of the Court below in holding the transaction to be not what under these authorities it might well be, but on the contrary holding it to be a transaction unknown to the Porto Rican law?

POINT II.

The contract of conditional sale by Valdes to Central Altagracia, Incorporated, was valid both as between the parties to the contract and also as against creditors of the vendee and the property covered thereby was therefore not subject to execution for debts of the vendee.

The validity of the contract of conditional sale of November 2, 1907, under the Porto Rican law has been established in Point I.

See *Blanchart* v. *Redondo*, *supra*.

The general rule of law laid down by the United States Supreme Court as applicable in the absence

of local statutes or decisions, also sustains the validity of this conditional sale both as between the parties and as against creditors of the vendee.

Harkness v. *Russell*, 118 U. S., 663.
Wm. W. Bierce, Ltd., v. *Hutchins*, 205 U. S., 340.
Bryant v. *Swofford Bros.*, 214 U. S., 279.

The entire subject was fully discussed by this Court in *Harkness* v. *Russell*, *supra*, and the Court, after considering the decisions in the various States, laid it down as the general rule, deemed by it to be established by overwhelming authority, "that, in the absence of fraud, an agreement for conditional sale is good and valid, as well against third parties as against the parties to the transaction," and that "a bailee of personal property cannot convey the title or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed."

Harkness v. *Russell*, 118 U. S., 663, at 681.

In the absence of any statute requiring registration, such contract of conditional sale is valid, without being recorded.

Bryant v. *Swofford Bros.*, 214 U. S., 279, 291.
Journey v. *Priestly*, 70 Miss., 584.

> "It has long been the settled rule of this Commonwealth that a sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee; and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods both against the vendee and against his creditors claiming to hold them against attachments."

"All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee, for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can aquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy.

Bigelow, *J.* in *Coggill* v. *Hartford & N. H. R. Co.*, 3 Gray, 545. (Mass.).

For additional authorities on this point, see

The Marina, 19 Fed. Rep., 760.
Blackwell v. *Walker*, 5 Fed. Rep., 419.
Rodgers v. *Bachman*, 109 Cal., 552.
Kohler v. *Hayes*, 41 Cal., 455.
Sargent vs. *Metcalf*, 5 Gray, 306.
Deshon vs. *Bigelow*, 8 Gray, 159.
Hirschorn vs. *Caney*, 98 Mass., 149.
Sere v. *McGovern*, 65 Cal., 244.
Herring v. *Hoppock*, 15 N. Y., 409.
Ballard v. *Burgett*, 40 N. Y., 314.
Cole v. *Mann*, 62 N. Y., 1.
Bean v. *Edge*, 84 N. Y., 510.

POINT III.

The transfer from Central Altagracia, Incorporated, to Valdes, and the conditional sale from the latter to the former being clear on their face and representing a transaction valid in every respect, no extraneous evidence of any intention to effect a transaction different from that represented by these instruments can be considered.

> "The following presumptions and no others are deemed conclusive:
>
> 2. The truth of the facts recited, from the recital in a written instrument, between the parties thereto, or other successors in interest by a subsequent title."
>
> Section 101, Law of Evidence of P. R.

> "Public instruments are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter.
>
> "They shall also be evidence against the contracting parties and their legal representatives, with regard to the declarations the former may have made therein."
>
> Section 1186, Civil Code of Porto Rico.
>
> See also, Sections 1222, 1223 and 1245 of Civ. Code of Porto Rico.

> "If the terms of a contract are clear and leave no doubt as to the intention of the contracting parties, the literal sense of its stipulations shall be observed."
>
> Section 1248, Civil Code of Porto Rico.

> "It is a general rule of the law of evidence, that a written contract, unambiguous in its

terms, cannot be varied, contradicted, modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed."

See

11 Eng. & Am. Enc. of Law, p. 548.
Shanklin v. *Washington*, 5 Pet., U. S., 590.
Ins. Co. v. *Wilkinson*, 13 Wall, U. S., 231.
Hancock v. *Cossett*, 45 Fed. Rep., 754.
Burness v. *Scott*, 117 U. S., 582.

"When the terms of an agreement have been reduced to writing by the parties it is considered as containing all those terms, and as between the parties there can be no other evidence of the terms of the agreement."

"All the oral negotiations and agreements concerning the exchange of lands are merged in the deeds and mortgages given in pursuance of such negotiations, and evidence of prior negotiations contradicting the terms of such instruments, is inadmissible."

Beall vs. *Fischer*, 95 Cal., 568.

"The plaintiff was entitled to the benefit of the rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms."

Thomas vs. *Scutt*, 127 N. Y., 133.
Braddy vs. *Nally*, 151 N. Y., 258.

"The general rule requires the rejection of parol evidence, when offered to cut down or take away obligations entered into between the parties and by them put in writing. And the reason of the rule suggests its application and its limitations. 'It would be inconvenient,' says Lord Coke, 'that matters in writing made by advice, and on consideration, and which finally import the certain truth of the agreement between the parties,

should be controlled by an averment of the parties to be proved by the uncertain testimony of slippery memory.'"

Chapin v. *Dobson*, 78 N. Y., 74.
Perry v. *Bigelow*, 128 Mass., 129.
Frost v. *Brigham*, 139 Mass., 43.
McGuinness v. *Shannon*, 154 Mass., 86.

POINT IV.

The levy under the Nevers & Callaghan judgment against Central Altagracia, Incorporated, is equally invalid if the machinery levied upon be assumed to be real estate under the law of Porto Rico.

Regarding, as the Court below apparently did, the leasehold and machinery as personal property, the foregoing points dispose of all claims of priority for the Nevers & Callaghan judgment.

Counsel for Nevers & Callaghan, who in the court below purported to represent also the heirs of Joaquin Sanchez de Larragoiti, the original lessor of the Central Altagracia properties, claimed, however, in the court below that the machinery placed in the Central constituted permanent fixtures attached to the soil and as such constituted real property under the law of Porto Rico.

Such contention, if correct, would be a strong argument in favor of the *Sanchez estate* which is *not*, however, *a party to this litigation*, but would directly defeat the levy under the Nevers & Callaghan judgment.

Articles Third and Eighth of the contract of lease of January 18, 1905, between Joaquin Sanchez de

Larragoiti and Salvador Castello provide respectively as follows:

> "3rd. In brief, the right and powers that Don Joaquin Sanchez de Larragoiti grants unto Don Salvador Castello, are to operate and work the said property for his account, and introduce therein such machinery as he may deem convenient; which said machinery, at the end of the years mentioned in Article 1st hereof, *shall become the exclusive property of Don Joaquin Sanchez de Larragoiti.*"
>
> "8th. Upon the expiration of the term agreed on under this contract, any improvement or machinery installed in the said Central *shall remain for the benefit of Don Joaquin Sanchez de Larragoiti;* and Don Salvador Castello shall have no right to claim anything for the improvements made" (Record, pp. 44-45).

Assuming, therefore, for the purposes of this argument that the machinery installed in the Central by Castello or his assigns became a part of the leasehold, it would, under the terms of the lease, have become the property of the owners of the fee, viz., the Sanchez heirs, and could not have been levied upon under a judgment against the lessee. Nor would a levy upon real property be valid, under Section 240, subdivision 1, of the Code of Civil Procedure of Porto Rico, without a showing that sufficient personal property for the satisfaction of such judgment could not be found.

The levy on the machinery under the Nevers & Callaghan judgment does not therefore give these judgment creditors of Central Altagracia any superior lien, no matter whether the property be regarded as real or personal estate. The decree appealed from is therefore clearly erroneous in so far as it adjudges such superior lien in favor of Nevers & Callaghan by reason of such levy.

POINT V.

The decree below, in so far as it directs that out of the proceeds of sale the Nevers & Callaghan judgment should be paid in priority to the Valdes claims, and in so far as it requires Valdes as purchaser at the sale to pay the amount of this judgment into Court, should be reversed.

At shown in this brief, the decree below, instead of providing for the foreclosure of an assumed mortgage in favor of Valdes, should have placed Valdes in possession of the properties of which, under the instruments of October 28 and November 2, 1907, he was the absolute owner. However, as the decree below has now been executed by a sale thereunder, at which Valdes became the purchaser of the properties of which he is now in possession, the injury to Valdes from the decree below, although entered on an entirely erroneous theory, consists mainly in his being obliged to pay in cash the amount of the Nevers & Callaghan judgment. This can be corrected by modifying or reversing, as above suggested, the portion of decree relating to the application of the proceeds of sale and the payment of the bid price, without affecting the sale which has already taken place under the decree.

Respectfully submitted,

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HUGO KOHLMANN,
MARTIN TRAVIESO, Jr.,
Counsel for Appellant Ramon Valdes.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 196.

CENTRAL ALTAGRACIA, INCORPORATED,
Appellant,

vs.

RAMON VALDES, AND GEORGE C. NEVERS, GEORGE B. ACKERSON AND JAMES G. CALLAGHAN, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME OF NEVERS & CALLAGHAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR APPELLEE RAMON VALDES

F. KINGSBURY CURTIS,
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MARTIN TRAVIESO, JR.,
Counsel for RAMON VALDES, *Appellee in* No. 196 *and Appellant in* No. 193.

THE BYRNE POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1911. No. 196.

CENTRAL ALTAGRACIA, INCORPORATED, Appellant, vs. RAMON VALDES, and GEORGE C. NEVERS, GEORGE B. ACKERSON and JAMES G. CALLAGHAN, copartners doing business under the firm name of Nevers & Callaghan.	**Appeal from the District Court of the United States for Porto Rico.**

BRIEF FOR APPELLEE RAMON VALDES.

Statement of Facts.

The present litigation arises primarily out of two instruments or agreements entered into between the appellant Central Altagracia, Incorporated, and the appellee Ramon Valdes affecting a certain leasehold and other properties in Porto Rico.

These instruments are set forth in full on pages 46 to 58 and pages 58 to 62 of the Record respectively.

By the first of these instruments, dated October 28, 1907, Central Altagracia, Incorporated, represented by its president, F. L. Cornwell, who was duly authorized for such purpose by resolution of

the stockholders and directors of the company, sold, assigned and transferred absolutely to Ramon Valdes, in consideration of $65,000 acknowledged to have been received by the company from Valdes:

(*a*) The contract of lease and all other rights of the company under the lease from Joaquin Sanchez de Larragoiti to Salvador Castello, dated January 18, 1905 (Record, pp. 47–49), and the extension thereof, dated June 6, 1905 (Record, pp. 49–50), which had theretofore, on July 1, 1905, been assigned by Castello to the appellant (Record, pp. 50–53), and

(*b*) Each and every right appertaining to the company in and to the machinery, utensils and appurtenances that existed on the properties of the Central Altagracia at the time the contract of lease was assigned to the company, as well as such rights as the company has in and to the machinery, utensils and appurtenances installed by it thereafter on said properties (Record, pp. 46–57, at p. 56).

By the second of the above public instruments, dated November 2, 1907, Valdes conditionally sold to Central Altagracia, Incorporated, the same properties and rights which were acquired by him under the instrument of October 28, 1907 (Record, pp. 58–62).

The price of this sale was the sum of $65,000, which the company in said agreement agreed to pay to Valdes in four instalments payable on the 1st day of April, of the years 1908, 1909, 1910 and 1911, respectively (Record, p. 60).

It was further stipulated in this contract of November 2, 1907, that upon failure to pay any one of the four instalments of the purchase price the total sum should at once become due and payable, and that Valdes was thereupon to have the right to enter and take possession of the properties conditionally sold by him to the company (Record, p. 60), and further that the title and ownership of the

lease, machinery and other properties was to remain in Valdes until the total purchase price was paid (Record, pp. 60–61).

Upon the default by Central Altagracia, Incorporated, in the payment of the instalment of purchase price maturing April 1, 1908, and also of the interest due on that date on the total purchase price (Record, p. 3), the present litigation arose.

History of Litigation.

The present litigation was commenced by the filing on June 2, 1908, of two petitions or bills, one by Valdes and the other by Central Altagracia, Incorporated, both praying for the appointment of a receiver of the properties under consideration.

The bill in the Valdes suit (referred to in the Court below as suit No. 564) set forth the November 2, 1907, contract of conditional sale, the default of the vendee thereunder, and the bringing of an action on the law side of the court for obtaining possession of the premises in accordance with the November 2, 1907, contract, and prayed for the appointment of a receiver to take charge of the property pending the decision of the action at law and for "such other relief in the premises as the nature and circumstances of the case may require."

The bill in the Central Altagracia suit (referred to in the Court below as suit No. 565) alleged concerning the instruments of October 28 and November 2, 1907, that these did not constitute Valdes the owner of the properties therein mentioned, but that they were executed in order to carry into effect an alleged arrangement pursuant to which the advances made by Valdes to the corporation at that time were to constitute a "refaccion" debt. In addition, this bill, among other things, contained charges of alleged mismanagement by Valdes as president of the corporation, without, however, setting forth the amount of loss, if any, claimed to have been caused by reason thereof.

Upon the filing of the above two bills the Court below appointed a temporary receiver and custodian, and later consolidated the two causes by an order dated July 20, 1908, and appointed a permanent receiver of the leasehold and other properties involved. This permanent receiver entered into possession and undertook the management of the Central, issuing various receiver's certificates in connection with the carrying on of its business during the sugar grinding season following his appointment.

From July, 1908, to July, 1909, no proceedings were taken by either of the parties, or by the Court below, in reference to the above bills or the demurrers which had been interposed thereto.

Meanwhile the receivership had resulted in a loss of about $17,000, represented in part by outstanding receiver's certificates (Record, pp. 28, 116–118).

The situation in July, 1909, when the next steps in the litigation were taken, is best stated in the language of the Court below, contained in a memorandum filed July 21, 1909:

> "The property is now and has been for about a year last past in the hands of a receiver of this Court. The receivership, in so far as keeping the property as a going concern without running in debt, has been an unfortunate failure. It has run in debt during the year's receivership, all told, about $17,000, and more than half that amount is represented by outstanding receivers' certificates.
>
> "This deplorable condition resulted in the Court calling all counsel interested before it at Mayaguez on the evening of the 17th of July instant, when, after some consultation between the Court and the several counsel, it was announced from the bench that the Court would soon take some action with a view to settling the many conflicting rights regarding the property" (Record, p. 28).

The Court's anxiety to dispose of the litigation is also shown by the memorandum filed July 28, 1909 (Record, p. 88).

In order to meet the alarming situation presented by reason of the extraordinary loss arising from the operations of the receivership and to forestall the probability of similar losses during the next grinding season, a speedy determination of the rights of the parties became necessary so that complete title to the properties involved might be vested as soon as possible in some one person or corporation. Accordingly, and *without any objection* being raised thereto by the parties, the Court below on July 21, 1909, entered the following order:

> "The Court having recently heretofore held a joint conference with all counsel in all of the above entitled cases involving the property and rights in and to the property known as the Central Altagracia, on this day sends a memorandum to the files (which counsel was directed to examine) setting forth its views in the premises, and its intention to bring the litigation, receivership, etc., regarding this property to an end and of causing immediate issue to be raised on the pleadings for that purpose, and in accordance with said memorandum, it is ordered:
>
> * * * * *
>
> "THAT THE DEMURRER IN SUITS 564 AND 565 AS CONSOLIDATED BE, AND THEY HEREBY ARE OVERRULED, AND RESPONDENTS IN EACH CASE ARE REQUIRED TO ANSWER ON OR BEFORE MONDAY THE 26TH INSTANT, SO THAT A TRIAL OF THE ISSUE THUS RAISED CAN BE BEGUN UPON THE FOLLOWING DAY BEFORE THE COURT WITHOUT THE INTERVENTION OF AN EXAMINER OR MASTER. PROVIDED THAT NOTHING IN THIS ORDER SHALL PREVENT THE PARTIES IN EITHER CASE, AS MAY BE PROPER, FROM IMMEDIATELY AMENDING THEIR BILLS OR FROM FILING A CROSS-BILL IN ADDITION TO AN ANSWER, BUT IN SUCH CASE THE LATTER SHALL BE CONSIDERED AS DENIED AND ISSUE MADE AS MAY BE PROPER SO THAT THE TRIAL MAY PROCEED NOTWITHSTANDING" (Record, pp. 27, 28).

Availing itself of the provisions of this order, Central Altagracia, Incorporated, thereupon, on

July 22, 1909, filed its amended bill of complaint in suit No. 565 (Record, pp. 33–40), and on July 26, filed its answer in suit No. 564 (Record, pp. 40–62).

Valdes thereupon, on July 27, 1909, filed his answer and cross-bill to the company's amended bill of complaint in No. 565 (Record, pp. 70–82), and on July 28, 1909, filed his replication to the company's answer in No. 564 (Record, p. 90).

Nevers & Callaghan, who were judgment creditors of Central Altagracia, Incorporated, were made parties defendant, and filed their answer and cross-bill to the Central Altagracia bill and to the bill of complaint and cross-bill of Valdes (Record, pp. 64, 65–69), the position taken by them in such answers and cross bill in reference to the contracts of October 28 and November 2, 1907, being along the same lines as the position taken by Central Altagracia, Incorporated, in its pleadings.

Valdes thereupon filed his replication to the answer of Nevers & Callaghan (Record, p. 91), and his answer to the cross bill of Nevers & Callaghan (Record, pp. 87–88).

After availing itself of the provisions of the order of July 21, 1909, by filing an amended bill in No. 565, and an answer to No. 564, as above stated, Central Altagracia, Incorporated, apparently determined upon an attempt to obstruct as far as possible the program theretofore acquiesced in by it and to delay the trial of the consolidated causes. Accordingly, on July 27, 1909, the date when pursuant to the order of July 21, 1909, the trial was to commence, counsel for Central Altagracia, Incorporated, filed an affidavit (Record, pp. 82–85), setting forth an alleged necessity for taking depositions of certain persons in Philadelphia and New York, and requested that the trial be postponed to give it an opportunity to take the depositions of such witnesses (Record, p. 86).

The Court below denied this application for an adjournment and stated to counsel for Central Altagracia, Incorporated,

> "that the matter has been pending for more than a year and that counsel had full notice

of the Court's intention to press the matter to issue and trial, and that it is not disposed to delay matters at this time, when the admissions of the pleadings are so broad that the proofs available here in Porto Rico are probably sufficient, and that the amended complaint already on file in suit No. 565 and the answer thereto, and the answer recently filed in suit No. 564, as well as the cross-bill also recently filed in suit No. 565, make as many allegations and admission as that the real issue between the parties can be plainly seen, and that in the opinion of the Court enough proof is available here in Porto Rico, and complainant in suit No. 565, if it sees fit, may file exceptions to the answer and an answer to the cross-bill, but that in the opinion of the Court, the same would be mere formalities, as the opposite pleadings of each of the parties in said causes reduces the issues almost entirely to questions of law, and hence the Court requires that the causes proceed and gives the said complainant in suit No. 565 until tomorrow morning within which to file his exceptions to the answer and his answer to the cross-bill in said suit, if he shall choose so to do, and informs him that he may consider the same as filed and file the same in writing at any time before the end of the trial, if he so desires, and that if it shall appear after complainant makes its case or even at any time before the close of the case, that counsel's statement is well founded, that the absence of the witnesses named does in fact prejudice his client, the Court will hear his application to have such depositions taken" (Record, pp. 86–87).

Before the commencement of the trial on July 28, 1909, counsel for Central Altagracia, Incorporated, objected to the taking of any evidence in any of the causes at that time, alleging as the ground of his objection that the causes were not at issue or in condition for the taking of evidence (Record, p. 89).

The Court thereupon overruled this objection and proceeded with the trial, hearing the evidence

offered by Valdes and Nevers & Callaghan and announcing several times to counsel for Central Altagracia, Incorporated, who, although not participating in the trial, were present and examined as witnesses on behalf of Nevers & Callaghan that Central Altagracia, Incorporated, had the right, if it chose, to cross-examine the witnesses or to make any proper proofs in the case at any time before the closing of the same, but that the Court would not further delay the taking of the testimony, as it felt that the issues were sufficiently before it and the proofs necessary were easily obtainable by all parties (Record, pp. 93, 94).

The proceedings above narrated leading up to the trial of the cause are also set forth in the Court's opinion on the merits filed on September 25, 1909 (Record, pp. 107–109), where the Court adds:

> "As we see it, the effort of Central Altagracia through their attorneys by their action in refusing to take part in the trial on the merits, is to secure delay in the proceedings. We cannot imagine any other object, because from the developments at the trial, it is manifest that every fact that can be known about the matter is well in evidence, and that nothing remains that necessitates the taking of the depositions of any of the witnesses in New York or elsewhere, mentioned in the affidavit of July 28th, of Judge Pettingill, solicitor for the Altagracia, which he filed as stated at the time he endeavored to avoid proceeding with the trial on the merits."

The decision of the Court below on the merits was substantially along the lines contended for in the bill (Record, p. 8) and amended bill (Record, p. 38) of Central Altagracia, Incorporated, as well as the pleadings of Nevers & Callaghan—that the transaction evidenced by the instruments of October 28th and November 2, 1907, constituted a loan from Valdes to the company and not a sale—and pro-

vided for the foreclosure of the lien so found in favor of Valdes.

Accordingly, the final decree, entered October 14, 1909, directed a sale and provided the method of distribution of the proceeds.

Upon the sale made pursuant to the final decree below, Valdes became the purchaser and was placed in possession of the leasehold and other properties theretofore covered by the receivership (Record, p. 137).

A controversy between Valdes and Nevers & Callaghan as to their respective priority to share in such proceeds of sale is before this Court in the case of Ramon Valdes, appellant, *vs.* Central Altagracia, Incorporated, *et al.*, October Term 1911, No. 193.

The errors assigned by Central Altagracia, Incorporated, in appealing from the decree below of October 14, 1909, are set forth on pages 122 and 123 of the Record. They all relate to matters of practice and procedure and are as follows:

"I.

"The Court erred in overruling the demurrer of Central Altagracia, Incorporated, to bill of complaint in cause No. 564 of aforesaid consolidated causes of action.

"II.

"The Court erred in ordering answer filed by Central Altagracia, Incorporated, to bill of complaint, on or before the 26th day of July, 1909.

"III.

"The Court erred in ordering Central Altagracia, Incorporated, to proceed to trial in the aforesaid consolidated causes of action without allowing said Central Altagracia, Incorporated, an opportunity to except to answer of Ramon Valdes, or plead to the said Valdes' cross-bill, in accordance with the Equity rules.

"IV.

"The Court erred in ordering Central Altagracia, Incorporated, to proceed to trial in the aforesaid consolidated causes of action with-

out allowing said Central Altagracia, Incorporated, opportunity to except to answer of Nevers & Callaghan, or plead to said Nevers & Callaghan's cross-bill, in accordance with the rules of Equity.

"V.

"The Court erred in not permitting and allowing Central Altagracia, Incorporated, time to sue out a commission to take the depositions of the several witnesses named in the petition and affidavit of N. B. K. Pettingill, Treasurer of the said Central Altagracia, Incorporated, sworn out on the 27th day of July, 1909.

"VI.

"The Court erred in proceeding to a trial and hearing in the aforesaid consolidated causes before the issues were properly settled and without the presence and intervention of said Central Altagracia, Incorporated.

"VII.

"The Court erred in overruling exceptions of Central Altagracia, Incorporated, to the answer of Ramon Valdes in suit No. 565, on September 7th, 1909.

"VIII.

"That the Court erred in not following the equity rules, promulgated by the Supreme Court of the United States, in the aforesaid consolidated causes of actions Nos. 564 and 565.

"IX.

"That the Court erred in entering a final decree herein in favor of the said Ramon Valdes and Nevers & Callaghan and against these defendants" (Record, pp. 122-123).

It will be observed that the assignment of errors set forth on pages 11 - 13 of the brief of Central Altogracia, Incorporated, in this Court, while purporting to be a substantial re-assignment of the errors assigned in the Court below, "with some omissions and some amendments in the way of more particularity," covers, in fact, a number of matters not included in the assignment of errors upon which the appeal was taken.

No mention whatever is made in the Court below of the matters referred to in items VIII to XV of the assignment of errors contained in the brief of Central Altagracia, Incorporated, in this Court.

Items I to VII, which are the ones discussed in Point I of said brief, are the only ones which correspond more or less closely with the assignment of errors in the Court below.

While it is submitted that upon the whole record in this case the alleged errors which were not assigned in the Court below should pursuant to the rule be disregarded upon this appeal, we will answer in this brief the various contentions of the Central Altagracia, Incorporated, substantially in the order in which they are presented in its brief.

ARGUMENT.

POINT I.

The Central Altagracia, Incorporated, was not denied any rights under the equity rules or otherwise in connection with the making up of the issues and the trial of the cause.

Central Altagracia, Incorporated, in Point I of its brief, discussing its first seven assignments of error, contends that the Court below erred:

(*a*) In not allowing certain periods claimed to be provided by the equity rules for bringing the cause to an issue;

(*b*) In requiring Central Altagracia, Incorporated, to produce its evidence orally, in open court, without the intervention of a master;

(*c*) In not allowing a period of three months for the taking of evidence, and

(*d*) In denying the request for time to sue out a commission to take the testimony of witnesses named in the affidavit filed July 27th, 1909.

None of the foregoing contentions are tenable.

A. Having availed itself of the provisions of the order of July 21st, 1909 (Record, p. 28), by filing an answer and an amended bill of complaint, Central Altagracia cannot complain of the conditions upon which said order granted the permission to file such additional pleadings.

After a demurrer had been interposed in the Central Altagracia suit, the latter had no right to amend its bill of complaint except with the permission of the Court, nor could Central Altagracia, Incorporated, except upon an order of the Court, file an answer in the Valdes suit after its demurrer therein had been overruled.

The conditions imposed by the Court in providing for the filing of such answer and amended bill of complaint are set forth in the order of July 21, 1909, as follows:

> "That the Demurrer in suits 564 and 565 as Consolidated be, and they hereby are overruled, and respondents in each case are required to answer on or before Monday, the 26th Instant, so that a Trial of the issue thus raised can be begun upon the following day before the Court without the intervention of an Examiner or Master. Provided that nothing in this order shall prevent the parties in either case, as may be proper, from immediately amending their Bills or from filing a cross-bill in addition to an Answer, but in such case the latter shall be considered as denied and issue made as may be proper, so that the trial may proceed notwithstanding."

By accepting the permission so granted, Central Altagracia, Incorporated, acquiesced in the terms upon which it is granted—viz.: That any cross-bill to its amended bill of complaint should be considered

as denied, and that the cause should be at issue, and that the trial of the cause by the Court, without the intervention of an Examiner or Master, should commence July 27th, 1909.

It is elementary that a litigant may not question an order, the parts of which are mutually interdependent, after he has acquiesced in its terms by taking advantage of the provisions in his favor.

The acceptance by Central Altagracia, Incorporated, of the permission granted to it for filing an answer and amending its complaint binds it absolutely to the conditions imposed and renders immaterial any questions as to the propriety of such conditions and as to the power of a court of equity ordinarily to cut down or enlarge the various periods prescribed by the equity rules.

If Central Altagracia, Incorporated, claimed that the conditions imposed by the order of July 21, 1909, were unauthorized or improper, it should have rejected the entire order and stood upon what it considered its rights without the order. Having, however, acquiesced in the order by taking advantage of its provisions and by failure to make any objection thereto at any time prior to July 27, 1909, the day set for the trial, Central Altagracia, Incorporated, cannot thereafter complain of the conditions imposed.

> "The party asking to amend may reject the permission, if connected with terms which he does not wish to accept; but he cannot accept a conditional order, so far as it is for his benefit, and reject the rest. * * * The plaintiffs asked to amend. It must be assumed that the amendment was material. They had no legal right to have the amendment allowed. The Referee in answer to their application, said, in substance, that he would grant the motion on condition that they would consent that the defendants might withdraw their answer, and demur. The plaintiffs thereupon amended their complaint, thereby assenting to the condition, and the defendants served a demurrer; and now the plaintiffs seek to set aside the order of the

Referee, so far as it allowed the defendants to demur, as beyond his power. We think the order was within his power, and also that the plaintiffs have by their conduct precluded themselves from questioning it."

Smith vs. *Rathbun*, 75 N. Y., 122, at 126–127.

"One who accepts the benefits of a decree or judgment is thereby estopped from review ing it or from escaping from its burdens."

Hill v. *Phelps*, 101 Fed. Rep., 650, 654.
Chase v. *Driver*, 92 Fed. Rep., 780, 786.

"In allowing amendments, the Court has a very wide discretion, and may reasonably, and should, permit them to be filed upon such reasonable conditions as may serve the ends of justice and *not delay the trial of the case.*"

Burkholder v. *Farmers Bank*, 23 Ky. Law Rep., 2449.

It is common practice to permit amendments on condition that the filing thereof shall not delay the trial of the case.

McClure v. *Bigstaff*, 18 Ky. Law Rep., 601.

Burgin v. *Giberson*, 23 N. J. Eq., 403.

See also:

Supreme Lodge K. of H. v. *Davis*, 26 Colo., 252.

B. Equity Rule 67 authorizes an order requiring parties to adduce their evidence orally in open court, and the three months' provision of Rule 69 does not apply in case of such oral hearing.

Central Altagracia, Incorporated, in V and VI of the assignment of errors, as contained in its brief, claims that the Court erred:

(*a*) In refusing to allow the Central a period of three months within which to take its evidence as provided in Equity Rule 69, and

(*b*) In requiring the Central to adduce and present its evidence orally before the Court without the intervention of an Examiner or Master against its protest and contrary to provisions of Equity Rule 67.

Neither of these claims is set forth in the assignment of errors which constitutes a part of the Record nor was either of these points put forward in the Court below as an objection to proceeding with the trial. Counsel's objection in the Court below was entirely based upon his contention that Central Altagracia, Incorporated, was entitled to further time within which to except to the Valdes answer and to plead or answer to his cross-bill and that the causes were not at issue until these steps had been taken. Neither of the contentions embodied in V and VI of the assignment of errors, now urged be Central Altagracia, Incorporated, was in any way called to the attention of the Court below.

Accordingly the answer to these two contentions is:

1. That not having been made in a court below, they cannot be urged for the first time on appeal as ground for reversal of the decree, and

2. That, as shown in A above, acceptance of the order of July 21st, 1909, was an acquiescence in an immediate trial in open court as required by said order.

Independently, however, of these considerations it is submitted that subdivision (9) of Equity Rule 67 expressly authorizes the Court in spite of objection to order the trial in open court upon evidence there to be given orally, and that the three months' period mentioned in Rule 69 does not apply in such case.

I. Paragraph (9) of Rule 67 is as follows:

> "Upon due notice given as prescribed by previous order, the Court may, at its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing."

To be sure the Circuit Court of Appeals for the Fourth Circuit has in the case of *Hyams* vs. *Federal Coal & Coke Co.*, 152 Fed. Rep., 970, referred to in the opposing brief, held that the above provision of the rule did not authorize the Court to require an unwilling party to adduce his evidence orally in open court.

This decision, however, is questioned in the very circuit in which it was made (see 180 Fed. Rep., at p. 329), is opposed to the practice in other circuits, notably in the Southern District of New York, and is, it is submitted, an obvious misinterpretation of the intent and meaning of the provision under consideration.

The history of Equity Rule 67 is discussed by this Court in *Blease* v. *Garlington*, 92 U. S., 1.

The Judiciary Act of 1789 (1 Stat., 88, Sec. 30) provided that the mode of proof by oral testimony and examination of witnesses in open court should be the same in all courts of the United States as well in the trial of causes in equity as of actions at common law.

Under the authority of the act of May 8th, 1792 (1 Stat., 276, Sec. 2), this Court at its February Term, 1822, adopted certain rules of practice for the courts of equity of the United States. 7 Wheat. V. Rules 25, 26 and 28 related to the taking of testimony by depositions, and the examination of witnesses before a master or examiner; but by Rule 28 it was expressly provided that nothing therein contained should "prevent the examination of witnesses *viva voce* when produced in open court."

These rules continued in force until the January Term, 1842, when they were superseded by others then promulgated, of which 67, 68, 69 and 78 related to the mode of taking testimony, but made no reference to the examination of witnesses in open court, further than to provide, at the end of Rule 78, that nothing therein contained should "prevent the examination of witnesses *viva voce* when produced in open court, if the Court shall, in its discretion, deem it advisable."

Afterwards (in August, 1842) Congress authorized this Court to prescribe and regulate the mode of taking and obtaining evidence in equity cases (5 Stat., 518, Sect. 6). While these rules remained in force substantially as originally adopted, and before any direct action of the Court under the special authority of this act of Congress, the case of *Sickles* v. *Gloucester Co.*, 3 Wall Jr., 186, came before Mr. Justice Grier on the circuit; and he there held, that, notwithstanding the rules, witnesses might still be examined in open court. It was his opinion that the act of 1789 guaranteed to suitors the right to have their witnesses so examined, if they desired it; that Rule 67 did not affect or annul the act of Congress or the policy established by it; and that a party had therefore the right to demand an examination of witnesses within the jurisdiction of the Court *ore tenus*, according to the principles of the common law, either by having them produced in court, or by having leave to cross-examine them, face to face, before the examiner.

Thereafter at the December Term, 1861, of this Court, Rule 67 was amended so as to provide for the oral examination of witnesses before an examiner in substantially in the manner now set forth in sub-division (2) of the present rule.

Later the Act of 1789 in relation to the oral examination of witnesses in open court was repealed by Section 862 of the Revised Statutes, which conferred upon the Supreme Court the right to prescribe by rule the mode of proof in equity cases.

This was the situation when the case of *Blease* vs. *Garlington* came before this Court for decision at the October Term, 1875, and this Court then held that while since the Revised Statutes, courts of equity were not required to take testimony orally in open court, they might nevertheless under the operation of the then existing rules do so. The Court said:

> "While therefore we do not say that even since the Revised Statutes, the Circuit Courts

> may not in their discretion under the operation of the rules permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so" (*Blease* v. *Garlington*, 92 U. S., 1, at p. 7).

The foregoing being the language of this Court prior to the adoption on May 15th, 1893, of paragraph (9) of Rule 67, the right of an equity court, in its discretion, to conduct an oral trial is even less open to question since the adoption of said paragraph (9) providing as follows:

> "Upon due notice given as prescribed in previous order, the court may, at its discretion, permit the whole or any specific part of the evidence to be adduced orally in open court on final hearing."

The obvious meaning of this provision is that on the application of either party and upon due notice, the Court may in its discretion have the evidence in the case taken orally in open court.

If, as is contended, the consent of both parties was to be required for such procedure, it would have been easy and simple to have said that the Court might with the consent of the parties take the whole or any part of the testimony in this manner. The requirements that due notice be given and that a previous order of Court be made repel the idea of mutual consent and clearly indicate that an adverse proceeding was in contemplation.

Why provide, as the rule does, that the Court may in its discretion permit the WHOLE of the evidence to be taken orally in open court upon due notice if as is contended the intention was that the Court should not have this power without the consent of both parties?

It stands to reason that the Court may permit to be done what both parties agree shall be done and no rule of court was necessary to announce this self-evident proposition.

If, therefore, the rule is to have any meaning at all, it must be that on the application of either party and upon due notice to the other, the Court may in its discretion direct the case to be tried before it upon oral testimony adduced in open court whether with or without the consent of the opposing side.

This is the interpretation which has been placed upon this rule in the Southern District of New York as is shown by the following rule of the U. S. District Court for said District, adopted December 7th, 1911:

"EQUITY RULES.

4. Trials in Open Court.

If any party to a suit in Equity desires a trial in open court upon evidence there to be given orally, he shall move for an order directing that mode of trial upon any general motion day; but if such proposed order be consented to it may be entered at any time without notice."

II. The provisions of Equity Rule 69, allowing three months for the taking of testimony, obviously can apply only where the testimony is taken by deposition pursuant to pargraph (1) of Rule 67, and perhaps also where it is taken before an examiner pursuant to paragraph (2) of Rule 67, but it certainly cannot apply in cases where the evidence pursuant to order made under paragraph (9) of Rule 67 is heard orally in open court.

The reference in Rule 69 to the return of the commissions and depositions, as well as the fact that the adoption of this rule on March 2, 1842, was simultaneous with the adoption of paragraph (1) of Rule 67, long preceding, therefore, the incorporation in Rule 67 of the provisions for an oral hearing in open court, clearly indicate that Rule 69 does not and was not intended to apply in cases of such oral hearings.

The provision that "three months and no more shall be allowed for the taking of testimony" cer-

tainly could not mean that the trial if taking place in open court must necessarily last a full three months after the cause is at issue; nor could it mean in direct violation of the very words of the rule that the trial, and therefore the taking of the testimony, shall not begin until the expiration of such three months.

It may be conceded for the purpose of this argument that, in the absence of any order directing a trial in open court, a final decree cannot be entered until the expiration of three months after the cause is at issue and that is all that was held in *Jewell* vs. *State Life Insurance Company*, 176 Fed. Rep., 64, referred to in brief of Central Altagracia, Incorporated.

Even this concession is contrary to the former practice in the Circuit Court for the Southern District of New York (see Rule 109) and the present practice of the District Court in said District (see Equity Rule 3), pursuant to which a cause may be set down for hearing on the pleadings if no proceedings for the examination of witnesses are taken within *thirty* days.

No matter, however, what the effect of Rule 69 may be in other cases, it certainly cannot apply in cases where the trial is directed to take place on oral evidence to be adduced in open Court.

It is submitted therefore that even if the question were open on this appeal and even in the absence of a waiver by Central Altagracia, Incorporated, as above shown, of any rights in this respect, there is no merit in V and VI of the assignment of errors set forth in the brief of Central Altagracia, Incorporated.

C. The order of July 21, 1909, as well as the refusal of the Court to accede to a postponement of the trial pending the taking of depositions by Central Altagracia, Incorporated, constituted a proper exercise of judicial discretion.

The continuance of the trial on account of the absence of the testimony of material witnesses has

always been held to be in the discretion of the trial Court.

Barrow v. *Hill*, 13 How., 54.
Cox v. *Hart*, 145 U. S., 376.
Isaacs v. *U. S.*, 159 U. S., 487.
Texas & P. Ry. Co. v. *Nelson*, 50 Fed., 814.
Drexel v. *True*, 74 Fed. Rep., 12.

The exercise of such discretion is not reviewable on appeal and certainly not where, as in the case at bar, the appellant has acquiesced by taking advantage of the portion of the discretionary order which was in its favor.

Moreover the record shows that the action of the Court below in respect to these discretionary matters was wise and proper.

In July, 1909, the receivership had been in force for a whole year and no further proceedings had been taken in the consolidated suits pending before the Court since July of the preceding year.

The concluding paragraph of the order of July 22nd, 1908, appointing the receiver (Record, p. 22) upon which opposing counsel relies provided that:

> "Any delay on the part of any of the parties hereto or of the stockholders of said Central Altagracia, *in asserting by suit* supposed rights, or liabilities, as between themselves or against one another during the pendency of this receivership shall not be considered * * * in the nature of laches in the assertion of such rights * * *"

This paragraph did not, as suggested, invite a postponenent of further proceedings in the then pending consolidated cause. Such proceedings obviously would not interfere with the receivership, and, in the nature of things, could not be postponed "during the pendency of the receivership," since the conclusion of the receivership depended upon the determination of these very questions. The invitation, if it may be so called, which this paragraph

extended was merely to delay the assertion of rights by *other* suits or proceedings.

The operation of the property by the Receiver during this interval of one year resulted, as has been shown, in the loss of about $17,000 (Record, p. 28), and in view of this and the likelihood of a similar loss during the next grinding season, it is easy to understand the anxiety of the Court below and its desire to bring about a termination of the receivership, and, by disposing of the pending litigation, to get complete title to the properties in some one person or corporation (Record, p. 31).

There was no absolute denial of the application of Central Altagracia, Incorporated, to take the depositions of the witnesses mentioned in its affidavit of June 27th, 1909, and the Court expressly offered to entertain such application if, at any time before the close of the trial, the necessity for the testimony of such witnesses should appear (Record, pp. 86–87).

The absence of good faith on the part of Central Altagracia, Incorporated, in attempting to delay the proceedings by requiring time to file exceptions to the Valdes' answer and to take the depositions of witnesses is shown by the frivolous character of the exceptions afterwards filed (Record, pp. 99–100) and by the fact that, as shown by the result of the trial, there was no necessity for the depositions of the witnesses mentioned in the July 27th affidavit.

The facts which, according to this affidavit, it was intended to prove by these witnesses, were largely either admitted by the pleadings or matters on which the Court, ultimately, without the testimony of these witnesses, found in favor of Central Altagracia, Incorporated.

It was not denied that purchases of machinery were made by Valdes in his own name and the Court found, without the testimony of the witnesses referred to, that the transaction between Valdes and the corporation was a loan and not a sale, and that as to the claims against the corporation purchased by Valdes from third parties, he was entitled to en-

force the same only to the amount paid by him therefor.

It is improbable that the testimony of outsiders could have added anything to the testimony of the parties themselves on the question of usury, which is the one to which the appellant's brief specifically refers (p. 26), nor that any testimony of persons then in the United States, as to alleged mismanagement of the property by Valdes, would have been more cogent than the testimony on this point available in Porto Rico. Had the necessity for additional testimony developed during the course of the trial appellant could have availed itself of the offer of the Court to then grant the necessary time for the taking of depositions.

The record shows a desire on the part of the Court below to afford Central Altagracia, Incorporated, every reasonable opportunity to offer proof in support of its allegations should the corporation desire in good faith to do so. Not having attempted to avail itself of the testimony at its command, appellant does not show any prejudice to it from the failure to postpone the trial pending the taking of depositions.

It may be surmised that in taking the position which it did in the Court below and refusing to participate in the trial, Central Altagracia, Incorporated, was influenced largely by the consideration that as against Valdes the interests of Nevers & Callaghan, who did participate in the trial, were in many respects similar to those of the corporation.

The officers and counsel of the corporation were introduced as witnesses by Nevers & Callaghan, and through the efforts of Nevers & Callaghan, and their participation in the trial below, many, if not all the claims and contentions of the corporation, were actually presented and litigated notwithstanding the refusal of counsel of Central Altagracia, Incorporated, to participate directly in the trial.

POINT II.

Central Altagracia, Incorporated, cannot complain of the decision below, on the ground that it declared the transaction between it and Valdes an equitable mortgage in favor of Valdes rather than a sale by it to Valdes with a subsequent conditional sale from Valdes to the corporation, or on the ground that it ordered a sale of the property, instead of placing Valdes in possession thereof.

Central Altagracia, Incorporated, in Points II and IV of its brief, discusses a question sought to be raised by VIII and X of the assignment of errors contained in said brief, claiming that the decree below should not have declared the existence of an equitable mortgage in favor of Valdes, nor the foreclosure thereof by sale.

As has already been pointed out, the question raised by these and the subsequent assignments is not covered by the assignment of errors filed in the Court below and might therefore be disregarded on the appeal.

In any event, however, Central Altagracia, Incorporated, cannot be heard to complain on this appeal, because the decree below was more favorable to Central Altagracia, Incorporated, than the contentions of Valdes, if sustained, would have warranted.

The execution of the instruments of October 28th and November 2nd, 1907, was admitted by all parties to the litigation. Under the general prayer contained in both the Valdes Bill and cross bill (Record pp. 5 and 81) for such other relief as equity or the

nature or circumstances of the case may require, it was proper for the Court to grant Valdes such relief as it considered him entitled to upon the facts and law in the case although upon a different theory of law than that upon which the said prayers for relief or the contentions of Valdes on the trial were based.

Lockhart v. *Leeds*, 195 U. S., 427.
Tayloe v. *Merchants Fire Ins. Co.*, 9 How., 390.
Patrick v. *Isenhart*, 20 Fed. Rep., 339.
London & San Francisco Bank v. *Dexter Horton & Co.*, 126 Fed. Rep., 593.

Appellant, Central Altagracia, Incorporated, cannot complain because such relief was less than what Valdes claimed to be entitled to.

POINT III.

The Court below had the right to order the sale of all the property included in the receivership, and Central Altagracia, Incorporated, cannot complain on this appeal of the sale of property claimed not to have been covered by the contracts of October 28 and November 2, 1907.

In IX and XI of the assignments of error contained in appellant's brief, Central Altagracia, Incorporated, claims that the Court below erred in decreeing that the so-called equitable mortgage was

a lien upon property not described in the contracts of October 28 and November 2, 1907, and in decreeing the sale of any property not so included. These contentions are thereupon discussed in Points III and IV of the Central Altagracia, Incorporated, brief.

The question presented is certainly a narrow one for the appellant to raise for the first time in the appellate court, and even if appellant's contention in this respect were sound, no such plain error is shown as would warrant this Court in noticing the same in the absence of any assignment or specification thereof in the court below.

The contention seems to be, in reference to the description contained in the decree, that the property mentioned in the third paragraph (Record, p. 115) was not included in the contracts of October 28 and November 2, 1907. These, it will be remembered, covered the leasehold as well as "the machinery, utensils *and appurtenances.*" For all the record shows, the items mentioned in the decree in paragraph 3 of the description are nothing more than an enumeration of the appurtenances which are covered by the contracts. If such was not the case Central Altagracia, Incorporated, should have brought the facts to the attention of the Court below so that the record might have shown clearly the discrepancy which is now claimed to exist between the Court's opinion and the decree entered thereon.

In the absence of any clear showing on this point it is proper for this Court to assume that the contracts of October 28 and November 2, 1907, included all the items enumerated in the decree and that Central Altagracia, Incorporated, had no personal or real property other than that included in the contracts.

Assuming, however, for the purpose of this argument, that the decree did order the sale of property other than that included in the above contracts,

there could nevertheless be no question as to the power and right of the Court to make such order. Certainly the receivership which was ordered by the Court below in accordance with the prayers of the bills of both Valdes and the corporation covered any and all property, whether specifically described in the contracts or not, and the Receiver's certificates were expressly made a first lien thereon. In order to provide for the payment of such certificates a sale of the whole or any particular portion of such properties could be ordered.

No harm was done to the corporation when the Court, instead of ordering such separate sale for the benefit of the holders of Receiver's certificates, provided for the sale of all the properties at one time in order to provide for the payment of other liens as well as the Receiver's certificates.

The Receiver's indebtedness, amounting to more than $17,000, has actually been paid out of the proceeds of the sale, and in the absence of any evidence that the property which it is claimed was not included in the Valdes contracts exceeded such amount, clearly it cannot be claimed that such sale was unauthorized or that the corporation suffered in any respect.

The total purchase price bid for all the property sold pursuant to the decree below was less than the sum total of the lien adjudged in favor of Valdes and the liens declared to be prior thereto.

The corporation had no rights in the property until all these liens were satisfied, and is not concerned in any disputes between the different lienors as to the priority of their respective claims.

Jerome vs. *McCarter*, 94 U. S., 734, 738.

Even the assumed unauthorized sale of property not covered by the contracts of October 28 and November 2, 1907, would not be ground for the rever-

sal of the entire decree. Upon a reversal of so much of the decree as directed the sale of the portion claimed to be improperly sold, the respective rights of the parties could readily be adjusted in the Court below, probably without the necessity of a resale.

Such limited reversals have taken place in cases where the decree included property for the sale of which there was absolutely no authority, and in one of such cases the costs of the appeal were imposed upon the appellant on account of his failure to call the attention of the Court below to the alleged error so as to render the appeal unnecessary.

Helm v. *Weaver*, 69 Tex., 143.
Peel vs. *Gary*, 54 Tex., 253.
Domestic Building Assn. v. *Nelson*, 172 Ill., 386.

In the case at bar, however, as has been pointed out, the Court, in view of the receivership and the lien of the outstanding certificates, had power to sell all the property actually sold, and appellant does not even show clearly that any of the property sold was not included in the contracts which were adjudged to be an equitable mortgage in favor of Valdes.

Appellant's ninth and eleventh assignments of error are an afterthought and are without foundation.

POINT IV.

The provisions of the decree below purporting to marshal and distribute all the assets of the corporation are not subject to attack upon this appeal.

The properties in question were sold under the decree for $100,000 (Record, pp. 135–136). This was

less than the sum total of the liens declared and adjudged by the decree. There was no surplus, therefore, in which either the corporation or its general creditors were interested, and no question can arise, therefore, as to the correctness of the provisions referring to distribution among such creditors.

POINT V.

Appellant's assignments of error XIII, XIV and XV are equally untenable.

Without any assignment in that respect in the Court below, and without any testimony in this regard on which to base the contention, Central Altagracia, Incorporated, now claims in its Point VI that there had been no default in its payments due to Valdes.

The Court below, on the other hand, found as a fact that there had been such a default, and there is nothing in the record on appeal upon which such finding can be reviewed.

The denial of the motion of Central Altagracia, Incorporated, made on November 5, 1909, for the modification of the decree of October 14, 1909, is obviously not reviewable upon the present appeal previously taken from such decree.

Moreover, the declaration and enforcement of any constructive trust as prayed for could be made, if at all, only after a trial in a suit brought for that purpose; and such relief certainly could not be granted upon a motion in a litigation which happens to be pending between the parties in respect to a different subject matter.

POINT VI.

The decree below should be affirmed, except in so far as it directs that out of the proceeds of sale the Nevers & Callaghan judgment should be paid in priority to the Valdes claims and in so far as it requires Valdes as purchaser at the sale to pay the amount of this judgment, in which last-mentioned respects it should be reversed.

As has been pointed out, the decree below, instead of placing Valdes in possession of the properties to which, under the instruments of October 28 and November 2, 1907, he claims to be entitled, declared the transaction between Valdes and the corporation to be an equitable mortgage in favor of Valdes and provided for the foreclosure thereof. In doing so the Court below gave to the above instruments practically the effect contended for by Central Altagracia, Incorporated, and it therefore has no reason to complain in this respect.

Valdes having become the purchaser of the properties at the foreclosure sale and being now in possession thereof, the injury to Valdes from the decree below consisted mainly in his being obliged to pay in cash the amount of the Nevers & Callaghan judgment. The question as to the correctness of the decree in this respect is raised in No. 193. If the appeal of Central Altagracia, Incorporated, in No. 196, is decided adversely to the appellant, Central Altagracia, Incorporated, is in no way interested in the controversies arising in No. 193 between Valdes and Nevers & Callaghan as to the question of priority between them.

The decision of this Court in *Cabrera* vs. *American Colonial Bank*, 214 U. S., 224, which is referred to in brief of appellant in No. 196, is not in

point. While it has often been held, as in the Cabrera case, that a court of equity will treat a deed, absolute in form, as a mortgage when it is executed as security for a loan of money, the protection of the debtor, which is the basis of decisions of that character, does not require a similar holding in the case at bar, where the deed from the corporation to Valdes was immediately followed by a conditional sale of the property by Valdes to the corporation.

As between the corporation and Valdes, the result under the circumstances of the case, is substantially the same whether the transaction be regarded as a mortgage in favor of Valdes or as a deed to Valdes with a conditional sale by him to the corporation.

There is no reason, however, why, so far as concerns the claims of Nevers & Callaghan under their execution, the instruments between Valdes and the corporation should not be given effect according to their terms.

Nor is there any reason why Nevers & Callaghan, who were, and were intended to be, unsecured creditors, should be preferred in the payment of their claim over Valdes, whose advances the corporation concedes were intended to be secured.

Even on the assumption that the doctrine enunciated in the *Cabrera* case is applicable in the case at bar, and on the assumption that the transaction between Valdes and Central Altagracia, Incorporated, was properly held to constitute merely an equitable mortgage, Valdes was, nevertheless, entitled to priority over Nevers & Callaghan.

As between Valdes and Nevers & Callaghan, the former is entitled to priority, even if both claims were regarded as unsecured.

Section 1825 of the Civil Code of Porto Rico, provides:

> "Section 1825.—With regard to the other personal and real property of the debtor, the following credits are preferred:
>
> * * * * *

3. Credits which without a special privilege appear.—

A. In a public instrument.

B. In a final judgment, should they have been the object of litigation.

These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments."

Public instruments are those authenticated by a notary with the formalities required by law (Civil Code, Sec. 1184). The required formalities are prescribed by Title 3 of the Notarial Law.

The Valdes claim appears in public instruments of this character, which are set forth in the printed record; as to the Nevers & Callaghan claim, the record does not even show a written contract, much less a public instrument relating thereto.

The date of the public instruments evidencing the Valdes claim is PRIOR to the date of the judgment in favor of Nevers & Callaghan, and as between the two, therefore, Valdes is entitled to priority, even if both claims had been regarded as unsecured.

The loan made by Nevers & Callaghan to Central Altagracia, Incorporated, is not shown by the record to have been made under such circumstances as to constitute it a *crédito refaccionario* (see Mortgage Law, Sections 59–64; also Brooks & Co. *v.* Estate of Veronica Journier, Jurisprudencia Civil Tribunal Suprema de Justicia España, Vol. XLIX, p. 33), and the claim made by Nevers & Callaghan on page 21 of their brief to a preference on this ground must, therefore, fall.

The contract found by the Court below to have existed between Nevers & Callaghan and Central Altagracia, Incorporated, does not purport to create a lien upon any property of the corporation, and merely provided for the repayment of the loan by the delivery of the sugar crop of the mill for the ensuing season (Record, p. 108).

It has been held, however, that such contracts under which money is advanced to sugar centrals to

be repaid out of the proceeds of sugar to be delivered monthly by the mill to the lender, are not true "contratos de refacción" within the meaning of Section 1824 of the Civil Code of Porto Rico, and that the holders of such contracts, especially when not recorded in the Registry of Property, have only the rights of general creditors.

Fritze Lundt & Co. vs. *Esperanza Central*, V Porto Rico Federal Reports, 1.

Moreover, it is difficult to see how Nevers & Callaghan as creditors of Central Altagracia, Incorporated, can consistently claim a lien by reason of *refacción* upon property which they contend does not belong to the debtor, Central Altagracia, Incorporated.

Whether sound or unsound, the contention of Nevers & Callaghan that under the lease from the Sanchez estate the leasehold and other interests of Central Altagracia, Incorporated, were not transferable, does not support the Nevers & Callaghan position in this litigation. Obviously a creditor of the corporation could not levy execution upon property which the corporation could not transfer by voluntary action.

The interests of the owners of the fee are not affected one way or the other by the determination of the present litigation affecting the rights to the leasehold, and the determination of the questions pending between Valdes and Nevers & Callaghan as to their respective rights in the Central Altagracia properties can be made independently of the position which is now or may hereafter be taken by the owners of the fee in reference to the alienability of the corporation's interest in the leasehold.

Respectfully submitted,

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